State of Illinois
County of Cook SS

Before the Industrial Commission of Illinois

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| Naomi Treece, | ) | |
| | ) | |
| Petitioner | ) | |
| v. | ) | No. 81 WC 595 |
| | ) | |
| Lyons Township High School | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND OPINION ON REMAND

Petitioner appealed the Decision of Arbitrator Galicia, dated June 25, 1986, finding in a proceeding subsequent to two prior proceedings under §19(b) of the Workers' Compensation Act, that as the result of accidental injuries arising out of and in the course of her employment on November 17, 1980, Petitioner was temporarily totally disabled for an additional period of 70 weeks, but failed to prove that a causal relationship exists between Petitioner's accidental injuries of November 17, 1980 and her condition of ill-being and need for medical services subsequent to November 1, 1982 or that she sustained any permanent disability or is entitled to any additional compensation under §19(k) or §19(l) of the Act and attorney's fees under §16 of the Act. The threshold issues then on Review, were whether a causal relationship existed between Petitioner's accidental injuries of November 17, 1980 and her condition of ill-being and need for medical services. The Commission after considering the entire record, adopted Arbitrator Galicia's findings and conclusions and affirmed his Decision on Arbitration in a Decision and Opinion on Review dated October 20, 1987. Petitioner appealed the Commission's Decision to the Circuit court of Cook County and on May 5, 1989, Judge Alexander P. White entered a Decision and Judgment Order, in case No. 87 L 51221, which stated:

> "The Court determines that Arbitrator Galicia erred in reviewing the prior record compiled before Arbitrator Green and then expressly finding that there was a lack of credibility

on the part of Petitioner. It was improper for him to gain determine the issue of Petitioner's credibility that was previously heard and determined by Arbitrator Green. The Court determines that by not accepting the prior determination of credibility, the finding of the Arbitrator, which was affirmed by the Commission, in respect to causal relation, was prejudicial. Furthermore, it was also improper for Arbitrator Galicia to misstate the reason for Dr. Mullan's referral of Petitioner to Mary T. Weed and Ms. Weed's findings and conclusions concerning Petitioner and her behavior. by so doing, the finding of Arbitrator Galicia, which was affirmed by the Commission, in respect to causal relation, was prejudicial to Petitioner. The Court determines the matter should be remanded to the Commission for 1) a re-evaluation of the record in respect to the issue of causal relation, accepting the prior determination of credibility by Arbitrator Green, and 2) appropriate findings compatible with the aforesaid re-evaluation.

The Decision of the Commission is set aside and the matter remanded to the Commission in accordance with the above opinion." (pp 9-10)

The Commission, after re-evaluating and considering the entire record, as directed in the Remand Order, modifies its prior decision and Opinion on Review dated October 20, 1987 and finds that a causal relationship exists between Petitioner's accidental injuries of November 17, 1980 and her present condition of ill-being and need for medical services and that Petitioner was temporarily totally disabled for a period of 175-1/7 weeks (July 10, 1981 to November 19, 1984), is entitled to $1,511.17 for reasonable and necessary medical expenses and, commencing November 19, 1984, is permanently and totally disabled under §8(f) of the Act and is entitled to additional compensation of $15,492.00 under §19(k), $2,500.00 under §19(l) and to attorney's fees of $3,098.00 under §16 of the Act for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Prior to the proceedings and the Arbitration and Industrial Commission Decision which is the subject matter of this Remand Order, Arbitrator Green entered two successive final §19(b) Decisions in Petitioner's favor. These proceedings were then heard, in their entirety, by Arbitrator Sherman. After proofs were closed, Arbitrator Sherman resigned her position as Arbitrator and became a Commissioner at the Industrial Commission without having written a Decision on Arbitration. This case was then assigned to Arbitrator Galicia for the purpose of writing a Decision on Arbitration based on the record of the proceedings conducted before Arbitrator Sherman. The Industrial Commission then adopted Arbitrator Galicia's findings and conclusions and made additional findings in its Decision and Opinion on Review dated October 20, 1987.

2. In the proceedings leading to Arbitrator Green's 19(b) Decision, entered on December 21, 1981, Dr. John Mullan, a Board Certified Neurosurgeon and Chairman of the Division of Neurosurgery at the University of Chicago Hospitals and Clinics and Petitioner's treating physician, testified that Petitioner had a post-concussion syndrome which had both organic and clear functional (psychological) components. Dr. Mullan referred the Petitioner to Mary T. Weed, a Registered Psychologist, for psychological testing in an attempt to quantify, if possible, what portion of her problems were organic as opposed to functional. Arbitrator Green's Decision stated:

> "The Arbitrator adopts the findings of Dr. Mullan as set out in Petitioner's Exhibit 7". (Dr. Mullan's evidence Deposition)
>
> "The Arbitrator further finds Petitioner's complaints to be credible and consistent with Dr. Mullan's findings" >

The Decision further stated:

> "The Arbitrator finds Petitioner's continuing disability as set out above" (that is, as diagnosed by Dr. Mullan) "is related to

post-concussion syndrome and related complaints and organic findings."

and that:

"The services provided by Mary T. Weed, M.A., at the request of Dr. Mullan was reasonably related to the diagnosis and treatment of Petitioner's condition" (a post-concussion syndrome with organic and functional components) "resulting from the above accident".

3. Mary T. Weed's findings and conclusions, which Arbitrator Green found to be reasonably related to the diagnosis and treatment of Petitioner's condition and which Judge White found were misstated by Arbitrator Galicia and hence prejudicial to Petitioner with respect to the issue of causal relation, were significantly different from those stated in Arbitrator Galicia's findings and conclusions. Ms. Weed did not state Petitioner intentionally did poorly on the test or that there was a strong possibility of her malingering for secondary gain. She testified:

"Her non-compliance is her sickness...in essence she is really disturbed, neurotic person with a lot of depression and anxiety...Her non-conforming is psychological."

With reference to the low IQ score Ms. Weed stated:

"I saw the low score 44 or the 0 on the subject test, and I concluded there probably was a lot of non-compliance, her knowledge, functioning level is the result of a personality disturbance when you have such discrepancy between the performance on the IQ test and the clinical impression, she does not talk like a severely impoverished intellectual. You see it going across the board and generally it means anxiety reaction unless it is a psychosis or if its just severe neurological disorders and would see it clinically in the person.

I think the lowness of the low scores, these are functional of the severely disturbed personality...Q: What is your diagnosis? A: Severely---severe neurosis with anxiety and depressive

reaction...she did not show good prognostic signs or good signs for recovery from the severe personality disorder...the IQ was a result of the severe neurosis rather than to the mental capacity, one's neurosis can mess one up."

Ms. Weed retested Petitioner in October, 1981 and concluded:

"In summary the large discrepancy between the IQ findings of the first and second testing are attributable to her erratic, primitive and fragmented personality with a readiness to become easily confused which appears to be exaggerated by possible organic brain damage. Signs of possible moderate organic brain damage were clearly seen in the area of memory and concentration and less clearly observable and to a lesser degree in the area of visual-motor functioning. She does still have some good intellectual ability and when she is not overwhelmed by her environment can occasionally perform quite adequately at a verbal level particularly when comprehension is involved. It is highly unlikely that his individual will move to a more stable level of functioning either intellectually or emotionally."

Ms. Weed did not say that Petitioner's poor performance on the test which she administered was or might have been attributable to malingering or a desire for secondary gain. Instead, in her response to Respondent's general question on cross-examination:

"Q: Can a person lie on a test? A: Yes. Q: This might be for economic gain? A: Absolutely. A:.....She couldn't do the work I gave her digits. Q: That could be defensive —that could be the attitude and motivation for economic gain? A: I have gone through that. Q: Is it possible? A: No, her nonconforming is psychological. I feel she has a sense of guilt, I don't think she is a kind of psychopath to exploit the situation. I don't see signs. I saw signs of hidden capacity, extreme mental illness."

Contrary to Arbitrator Galicia's findings, Mary Weed's test results were not diametrically opposed to Arbitrator Green's observation of Petitioner when she testified. Ms. Weed stated this and added:

"To repeat, noncompliance inability to perform is psychological, she can act better than other times...that is a typical neurotic...she was not complying, may want to make herself seem sicker. It is her sickness.

THE ARBITRATOR: "Thank you".

Finally, Mary Weed stated that she thought Petitioner had a personality disturbance before the work injury but the injury probably aggravated the condition and was the straw that broke the camel's back because she was working and coping prior to its occurrence. She concluded Petitioner incapable or working and her prognosis was poor and her condition would probably be ongoing for the balance of her life making her psychiatrically unable to work.

4. The Commission accepts the prior determination of Petitioner's credibility by Arbitrator Green, as directed in the Remand Order, and further notes that Petitioner's testimony at the proceedings which are the subject matter of this Remand Order was consistent with her prior testimony and the findings and opinions of Drs. Mullan, Sackett, Ziporyn and Garron. The Commission further notes that Dr. Mullan specifically testified that he believed Petitioner to be honest when he was deposed by Respondent on April 2, 1985.

5. Arbitrator Galicia found that Dr. Mullan felt a post-concussion syndrome would normally resolve itself within two years. The record, however, reflects that Dr. Mullan testified, in two separate evidence depositions, that there is no specific treatment known for a post concussion syndrome and the minimum time for significant problems to settle down was sic months and the hoped for time was two years but if the syndrome did not resolve itself within two years it probably never would. Arbitrator Galicia referred to the Petitioner having had several normal EEG's and stated:

"How many normal EEG's does one need before he or she is found to be normal".

The record, however, reflects that Dr. Mullan testified a positive EEG is very significant for organic brain damage, which Petitioner had, and that Petitioner had significant abnormalities on April 1, 1981 and again on February 17, 1983. We further stated a negative (normal) EEG "doesn't tell very much" and is not very meaningful since a 24 hour EEG is more reliable than one given over a brief time span and that Petitioner was taking Dilantin which could suppress her epileptic focus which he stated was caused by her work injury and a person could have a normal EEG and still have a convulsion 30 minutes later. Finally, Arbitrator Galicia stated that there was no credible psychological evidence to support a finding that the "alleged" (despite two prior final §19(b) Decisions holding that there was a work related accident) trauma aggravated or exacerbated Petitioner's psychological condition. In so doing he a) ignored the specific findings made in Arbitrator Green's second Decision on Arbitration, relating to the findings of both Dr. Mullan and the psychologist, Mary Weed; b) ignored Dr. Mullan's second evidence deposition, taken by Respondent, that Petitioner's.

> "...Inability (sic) work dates from her injury. And there's been no other cause that we know of that would have caused her to stop working except the injury. The problem is how much of this pain that she now (sic) is what we call organic and how much is functional. But irrespective, both date from her injury".
>
> Dr. Mullan added
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> "...I have recollection that she has always been significantly psychologically upset by this whole episode."
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> Dr. Mullan added that Ms. Weed's test
>
> "....reveal, as we suspected, that there was, indeed, were a good deal of functional problems...so these essentially confirm the clinical impression that there is a mixture of organic and inorganic. The EEG tends to support the organic component. The psychological testing supports the functional component."

c) filed to mention the opinion of Respondent's psychiatrist, Vincent A. Sackett, M.D., Medical Director of Warrenville Clinic, Ltd., which was admitted into evidence over Respondents objection as an admission against interest, that when he examined Petitioner on September 20, 1984 he found she had

> "1) Nonpsychotic organic brain syndrome secondary to post-concussion syndrome.
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> 2) Dysthymic reaction - a non-psychotic depression probably secondary to the loss of function Ms. Treece (sic) has experienced."

and Respondent's stipulation that in Dr. Sackett's opinion;

> "Petitioner was suffering from a disability which is causally related to the trauma in question."

d) failed to mention the testimony of David Garron, Ph.D., the Clinical Psychologist that Respondent initially referred Petitioner to for evaluation on October 24, 1981 and who subsequently saw Petitioner again on December 22, 1983 and August 4, 1984.

and e) ignored the psychiatric opinion of Dr. marvin Ziporyn which was consistent with the other medical, psychological and psychiatric opinions, with the sole exception of Dr. Glista, that Petitioner's work related injury was causally related to her present condition of ill-being.

6. The Commission modifies paragraph 2 of its October 20, 1987 Decision on Review as follows: The Commission notes that on Review the parties agreed to admit as Joint Exhibit 1 on Review, the evidence deposition of Dr. Mullan taken by Respondent on April 2, 1985, and Joint Exhibit 2 on Review, the transcript of the February 25, 1985 hearing at Arbitration at which Dr. Garron testified, which erroneously was not previously transcribed.

7. The Commission modifies paragraph 3 of its October 20, 1987 Decision on Review as follows: Dr. Garron, a Clinical Psychologist, who examined Petitioner on October 21, 1981 at the

request of Dr. Shenker, Respondent's examining physician, made a diagnosis of mixed bipolar disorder and recommended that she be hospitalized for inpatient psychiatric care. The diagnosis and recommendation was set out in a letter to Dr. Shenker and made no reference to the cause of Petitioner's then existing condition of ill-being. Subsequently Dr. Garron re-examined Petitioner on December 23, 1983 and felt she was worse than when he first saw her; he made the same diagnosis as previously but added she was more depressed, was unable to work, that there might be an organic component consistent with the positive EEG results and she needed immediate psychiatric treatment and should be hospitalized. Dr. Garron saw Petitioner for a third time on August 4, 1984. He again made the same diagnosis as on the two prior occasions but added her condition had shifted to the depression side of the bipolar continuum. He said she was disabled and should be hospitalized to be weaned from the medication she was on and that his finding of decreased finger tapping speed in her right hand was consistent with the positive EEG's and the people that have concussive disorders often have affective disturbances thereafter, as Petitioner had, and the most common post-concussion emotional disturbance according to the literature was a depressive or affective disorder. He added that Petitioner's condition was chronic, that she was severely disabled, that he didn't know whether the entirety of the very severe and life threatening emotional disturbance is attributable to the blow on the head, that "medications for headache, other things, sometimes they are known to have side affects, depressive disorders of some severity", that speaking of medications, "it may well be that her treatment for the original blow may have aggravated her condition, rather than ameliorated it" and that "it is at least possible that her condition is a consequence of the blow of the head." Further, Dr. Garron testified she was still in need of treatment, unable to do anything and that her life situation had deteriorated over the year.

8. The Commission modifies paragraph 4 of its October 20, 1987 Decision on Review as follows: Dr. Mullan, On November 11, 1982 "encouraged" Petitioner to try to go back to work since he felt there was no other treatment available to her and she could return to work or not depended on whether she had pain or not and this was something only Petitioner could answer. He concluded

she had a post-concussion syndrome with an organic and functional component and said, in his evidence deposition taken by Respondent on April 2, 1985, that Petitioner's

> "...inability (sic) work dated from her injury. And there's been no other cause that we know of that would have caused her to stop working except the injury. The problem is how much of this pain that she had now is what we call organic, and how much is functional."

Respondent's rehabilitation specialist, ruth Owens, was attempting to coordinate possible treatment for Petitioner and only after this was achieved, if at all, could she realistically try to assist Petitioner to return to work. Neither Ruth Owens nor any other representative of Respondent ever offered Petitioner he old job or attempted to initiate efforts to find her any other job. Even though Dr. Mullan told Ruth Owens that he was adamantly opposed to psychiatric treatment for Petitioner because he thought it would only aggravate the situation. Ruth Owens had Petitioner tested psychologically and told her to stop taking the medication which Dr. Mullan had prescribed for her. Ruth Owens then scheduled Petitioner to be re-evaluated by a neurologist, rather than Dr. Garron, the psychologist to whom Respondent previously referred her, for further evaluation despite the obvious psychological/psychiatric problems she was having. When Petitioner told Ruth Owens she was sick and could not keep the appointment with Respondent's neurologist, in advance of said appointment, and another appointment could not be immediately rescheduled due to a communication problem, Ruth Owens wrote Respondent recommending that another medical appointment be scheduled or rehabilitation services be terminated and Respondent elected to terminate the rehabilitation services.

9. The Commission modifies paragraph 5 of its October 20, 1987 Decision on Review as follows: Arbitrator Galicia specifically relied upon the opinion of Dr. Glista, a Board Certified Neurologist, who examined Petitioner on September 13, 1984, at Respondent's request. He diagnosed severe depression and probably underlying personality disorder. Dr. Glista opined based on a reasonable degree of medical and surgical certainty that

Petitioner's accidental injuries of November 17, 1980 ere not related to her present condition of ill-being and that it was not plausible that the November 17, 1980 accident aggravated Petitioner's depression for a period of 4 years. The Commission notes that Dr. Glista testified that most neurologists are "junior psychologists" but he did not consider himself an expert in this area. The Commission further notes that Drs. Mullan, Ziporyn, and Sackett were all of the opinion that Petitioner's present condition of ill-being was causally related to her injury of November 17, 1980. Dr. Mullan testified, unequivocally, that Petitioner suffered from a post-concussion syndrome (which includes sequels such as headaches, poor memory, inability to concentrate and function, tiredness, poor sleep, irritability and psychological problems) dated from the time of her work related injury. He also said his opinion regarding her psychological problems were reinforced by Mary Weed's findings. And, Dr. Mullan specifically disagreed with Dr. Glista's opinion about the length of time depression can last stating it can last a lifetime and the majority of people with findings like Petitioner's will never return to work. Dr. Ziporyn, a Board Eligible Psychiatrist, testified that he agreed completely with Dr. Mullan's diagnosis and opinion relating to causal connection and said that a post-concussion syndrome usually resolves itself within 2 years or not at all. He stated this opinion is consistent with the American Psychiatric Association's codification called the Diagnostic and Statistical Manual. Dr. Sackett, Respondent's examining psychiatrist, who saw Petitioner one week after she was seen by Dr. Glista, agreed with Dr. Mullan's diagnosis that Petitioner had organic as well as functional (psychological/psychiatric) problems and that the Petitioner's problems were causally related to her work injury of November 17, 1980. Dr. Garron, the Clinical Psychologist, who initially examined Petitioner at the request of Dr. Shenker, Respondent's examining physician, in October, 1981, diagnosed on three separate occasions, namely in October, 1981, December 1983 and August, 1984 that Petitioner had a mixed bipolar disorder for which she should be hospitalized and treated. On the second occasion he stated she was more depressed than when he first saw her and on the third occasion he noted she was shifting even more to the depressive side of the bipolar continuum. He further testified that people with concussive disorders often

have affective disturbances thereafter, as Petitioner had, and the most common post-concussion emotional disturbances according to the literature is a depressive or affective disorder.

Based on the foregoing, the Commission modifies its prior Decision and Opinion on Review dated October 20, 1987 and finds that a causal relationship exists between Petitioner's accident injuries of November 17, 1980 and her present condition of ill-being and need for medical services.

10. Respondent closed its rehabilitation file on Petitioner on April 8, 1983 and terminated the payment of temporary total disability benefits to her on April 10, 1983 without having had her re-examined by Dr. Garron, the Clinical Psychologist, who had seen her previously at the request of Respondent's Dr. Shenker. Only after Dr. Garron's December 23, 1983 re-examination of Petitioner, when he gain diagnosed a mixed bipolar disorder, but with more depression than in October, 1981, and found her disabled and in need of immediate hospitalization, did Respondent reopen its rehabilitation file. Respondent then referred Petitioner to Dr. Glista on September 13, 1983 and Dr. Sackett on September 20, 1984 and they both opined that Petitioner was disabled. On November 19, 1984, Respondent again ceased all rehabilitation efforts without paying any benefits to Petitioner. Given Respondent's failure to provide vocational rehabilitation; medical, psychological or psychiatric treatment or show availability of work which Petitioner was capable of performing, Dr. Mullan, Dr. Garron and Dr. Ziporyn's poor prognosis for improvement in her condition of ill-being, and the now prolonged duration of Petitioner's disability, the Commission finds Petitioner permanently and totally disabled pursuant to §8(f) of the Act commencing November 19, 1984, the day Respondent last closed its rehabilitation file. The Commission further finds that Petitioner was temporarily totally disabled from July 10, 1981 to November 19, 1984, a period of 175-1/7 weeks, and is entitled to $1,511.17 for reasonable and necessary medical expenses.

11. The medical evidence offered by Respondent was Dr. Glista's opinion that no causal relationship existed between petitioner's accidental injuries of November 17, 1980 and her condition of ill-

being which existed on September 13, 1984. This opinion was contrary to the opinions of both Dr. Garron, the Clinical Psychologist that Respondent initially referred Petitioner to in October, 1981 and Dr. Sackett, the psychiatrist that Respondent referred Petitioner to one week after she saw Dr. Glista in September 1984. Nevertheless, Respondent elected to rely on Dr. Glista's opinion, despite his own admission that he was a "junior psychologist" and did not consider himself an expert in the area, notwithstanding the fact that both Drs. Garron and Sackett were experts in psychological/psychiatric matters.

Based on the foregoing, the Commission finds that Respondent's failure to pay compensation benefits subsequent to April 10, 1983 was unreasonable and vexatious and that Petitioner is entitled to additional compensation of $15,492.00 under §19(k) of the Act representing 50% of the unpaid compensation accrued between April 10, 1983 and December 12, 1986, the last Hearing on Review, is entitled to additional compensation of $2,500.00 under §19(1) of the Act, and is entitled to attorney's fees of $3,098.00 under §16 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $198.08 per week for a period of 175-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing November 19, 1984 the Respondent pay to the Petitioner the sum of $198.08 per week for life under §8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of the Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION the Respondent pay to Petitioner the sum of $1,511.17 for necessary medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to the Petitioner additional compensation of $15,492.00 as provided in §19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to the Petitioner additional compensation in the amount of $2,500.00 as provided in §19(1) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $3,098.00 as provided in §16 of the Act; the balance of attorney's fees to be paid by Petitioner to her attorney.

IT IS FURTHER ORDERED BY THE COMMISSION that the respondent pay to the Petitioner interest under §19(n) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Dated: January 31, 1990

Richard Gilgis
Ted Black, Jr.
Barry A. Ketter